

September 21, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: National Security Archive

Date of Filing: July 12, 2006

Case Number: TFA-0169

On July 12, 2006, National Security Archive (NS) filed an appeal from a determination issued to it on June 13, 2006, by the Department of Energy's (DOE) Freedom of Information and Privacy Act Group (FOI). In that determination, FOI responded to a request for documents that NS submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. FOI forwarded the request to the DOE's Office of Policy and International Affairs (PIA) for a search for responsive documents. PIA located a document responsive to the request and released the document with some deletions. This appeal, if granted, would require FOI to release the withheld portion of the document.

I. Background

NS filed a request under the FOIA for "the October 2002 publication of the Department that pertains to oil market contingency planning that was referenced by the Energy Information Administration." Letter from Abel Lopez, FOI, to Thomas Blanton, NS (June 13, 2006) (Determination Letter). FOI forwarded the request to PIA for a search. PIA located a 166-page document responsive to the request titled "October 2002, Oil Market Contingency Planning." PIA released the document but withheld under Exemption 2 of the FOIA information contained in three tabs – Tabs C, D, and P – totaling 19 pages in length.

In its Appeal, NS argues that

Revealing the Department's planned response to an oil shortage resulting from U.S. military action overseas...would in no way undermine the Department's efforts, as the United States has already been experiencing an oil shortage and rising oil prices due to military action in the Persian Gulf...All contingency plans

that might have been placed at risk by the release of these excised portions have already been implemented or rejected.

Letter from Thomas S. Blanton, NS, to OHA (July 11, 2006) (Appeal). NS also maintains that the document is based entirely on public data and, therefore, “its release would provide no new information to those who might attempt to violate the law and avoid detection.” *Id.* Finally, NS argues that withholding of the document under Exemption 2 is inappropriate because

All military action is carried out on behalf of the people of the United States, and, therefore, it is in the public’s interest to be fully informed of the consequences...if United States involvement in the Persian Gulf causes a large enough oil shortage as to require a large-scale response by the Department of Energy, such information is by no means limited in scope to internal rules and practices, but is directly relevant to the daily lives of the American public.

Id. Therefore, NS argues, the information is not the type of “internal personnel rules and practices” to which Exemption 2 applies. *Id.*

II. Analysis

Exemption 2 exempts from mandatory public disclosure records that are related solely to the internal personnel rules and practices of an agency. 5 U.S.C. § 552(b)(2); 10 C.F.R. § 1004.10(b)(2). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature (“low two” information) and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement (“high two” information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves the second category, high two information. An agency seeking to withhold information under high two must be able to show that (1) the requested information is predominantly internal and (2) its disclosure significantly risks circumvention of agency regulations or statutes. *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (en banc).

In withholding the information in Tabs C, D, and P, PIA described the withheld information as follows:

The information deleted includes the [DOE]’s role in energy market events in the Middle East in case of oil supply disruptions. Although the information contained in Tabs C and D [is] based on case scenarios, disclosure would reveal the [DOE]’s vulnerability assessments related to response policy, possible courses of action, and pros and cons related to market reaction induced by rising oil prices. It could also lead to speculation about economic damage and its impact on the country’s economy

* * *

Tab P contains information on the Office of Public Affairs Communication Plan of the [DOE]. Release of this information would reveal the [DOE]'s strategy to conduct and implement our communication plan of oil supply disruptions.

Determination Letter.

After reviewing the withheld documents, we disagree with PIA's application of Exemption 2. PIA's principal rationale for withholding the information under Exemption 2 is that if potential terrorists or other malefactors obtained that information, they could use it to gain insight into the government's response process, identify possible targets or vulnerabilities, or develop methods to circumvent or impede the government's response to an oil supply disruption. PIA maintains that release of the information would risk circumvention of the DOE's statutory and regulatory duties to protect information that could facilitate terrorist activity against the nation's resources.

NS's argument that the document was compiled entirely of public data and that its release "would provide no new information to those who might attempt to violate the law and avoid detection" is without merit. Although some statistics and figures used in the document were derived from public data, the various strategies, estimates, and policy recommendations contained in the withheld portions of the document are not public information and, therefore, its release could provide new information to those attempting to target the nation's resources. *See* Memorandum of Telephone Conversation between Jim Hart, PIA, and Diane DeMoura, OHA (July 19, 2006).

NS's final argument – that any United States military involvement in the Persian Gulf which causes an oil shortage large enough to require a large-scale response by the DOE is not limited in scope to internal rules and practices, but rather is directly relevant to the daily lives of the American public – impliedly asserts that the application of the high two exemption to the withheld information fails the first prong of the *Crooker* test – that the information be predominantly internal. We agree with that argument.

Information is "predominantly internal" if it "does not purport to regulate activities among members of the public...[and] does [not]...set standards to be followed by agency personnel in deciding whether to proceed against or take action affecting the members of the public." *Cox v. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979). In this case, the withheld information appears to include specific strategies and estimates the DOE would employ in responding to severe oil disruptions in overseas oil supplies, examples of possible domestic oil disruptions and response strategies, and a detailed public affairs communications strategy for disseminating crucial information to the public in the face of oil supply disruptions. It is unclear whether this information is merely the internal personnel rules and practices of the DOE. The withheld information appears to contain specific recommended steps for agency personnel for responding to an oil supply disruption, a situation which would clearly affect members of the public. Accordingly, we believe the application of Exemption 2 does not satisfy the requirements set forth by the court in *Crooker*.

However, our review of the withheld documents indicates that another exemption may be proper in this case. Exemption 5 of the FOIA exempts from mandatory disclosure documents that are

“inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Exemption 5 permits withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated under the deliberative process privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). In order to be shielded by this privilege, a record must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

Predecisional materials are not exempt merely because they are prepared prior to a final agency action, policy, or interpretation. These materials must be a part of the agency’s deliberative process by which decisions are made. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). The deliberative process privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

In this case, PIA informed us that the withheld documents contain recommendations that have not been adopted and were not finalized. See Memorandum of Telephone Conversation between Jim Hart, PIA, and Diane DeMoura, OHA (July 19, 2006). PIA’s position, therefore, is that the documents do not represent a final agency action, policy, or interpretation. *Id.* Furthermore, PIA informed us that the estimates, strategies and recommendations are the product of subordinates engaging in discussions about possible case scenarios and responses in order to be able to make informed recommendations to higher-level supervisors should the need arise. *Id.* Accordingly, it appears to us that they may be both pre-decisional and deliberative.

As stated above, we do not believe that PIA’s application of Exemption 2 was proper. However, we believe that the documents may be properly withheld under Exemption 5. Accordingly, we will remand this matter to PIA in order that it may reexamine the documents, make a determination as to whether Exemption 5 (or another exemption) applies, and either release the documents to NS or issue a new determination justifying any withholdings it makes under a different exemption of the FOIA.

It Is Therefore Ordered That:

- (1) The Appeal filed on July 12, 2006, by National Security Archive, OHA Case No. TFA-0169, is hereby granted as set forth in paragraph (2) below.
- (2) This matter is hereby remanded to the Office of Policy and International Affairs for further processing in accordance with the instructions set forth in this Decision and Order.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 21, 2006